MAY 25 2011

CAPITAL CASE
No. 10-1302

IN THE
Supreme Court of the United States

CARL PULATTI,
Petitioner,

v.

EDWIN G. BUSS, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE FLORIDA CAPITAL RESOURCE CENTER IN SUPPORT OF PETITIONER

JENNIFER L. GREENBERG
TERENCE M. LENAMON
STUART L. HARTSTONE
ALLISON J. LEONARD
FLORIDA CAPITAL RESOURCE CENTER
100 N. Biscayne Blvd., Suite 3070
Miami, FL 33484
(305) 373-9911

TALBOT "SANDY" D'ALEMBERTE
Counsel of Record
D'ALEMBERTE AND PALMER, P.L.L.C.
P.O. Box 10029
Tallahassee, FL 32302-2029
(850) 352-6292
palmer@dalemberteandpalmer.com

Attorneys for Amicus Curiae Florida Capital Resource Center

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

IN THE

Supreme Court of the United States

No. 10-1302

CARL PUIATTI,

Petitioner,

v.

EDWIN G. BUSS, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE

Pursuant to Supreme Court Rule 37.2(b), Florida Capital Resource Center respectfully moves for permission to file the accompanying *amicus curiae* brief. This brief is submitted in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. In accordance with Supreme Court Rule 37.2(a), both Petitioner and Respondent have received timely notice of FCRC's intent to file this *amicus* brief. Petitioner Carl Puiatti has consented to the filing of this brief.[1] Respondent State of Florida has not.

[1] Petitioner's letter expressing consent has been filed with the Clerk of Court.

Florida Capital Resource Center ("FCRC") is a non-profit organization whose mission is to protect the constitutional rights of capital defendants in the State of Florida. To that end, FCRC provides free consultation, research, advocacy, and other necessary resources to capital defenders and mitigation specialists statewide to ensure their clients receive the best representation possible. Additionally, FCRC plays a major role in addressing the greater problems within Florida's capital justice system by researching trends and identifying disparities and injustices therein.

As such, FCRC has a direct interest in the resolution of this case because of the disturbingly prejudicial effect the Eleventh Circuit's ruling will have on joint capital proceedings in the State of Florida. Further, FCRC is in a unique position to inform the Court of the far-reaching implications of that ruling, particularly as they relate to Florida's already infirm capital sentencing scheme, a matter of tremendous importance to FRCR.

There are at least 126 joint-capital cases currently pending in Florida that involve 389 codefendants, all of whom benefit from access to FCRC resources.[2] Having an interest in the fair and constitutional administration of criminal justice, Florida Capital Resource Center respectfully requests this Court grant leave to file the accompanying brief as *amicus curiae* on behalf of all of those defendants, who otherwise have no voice in this action, as well as those who come later and find themselves in a joint penalty

---

[2] Based on data compiled by Florida's Office of the State Courts Administrator. This number includes capital codefendants facing trial in 59 of Florida's 67 counties.

proceeding facing the ultimate sentence in the State of Florida.

Respectfully submitted,

JENNIFER L. GREENBERG
TERENCE M. LENAMON
STUART L. HARTSTONE
ALLISON J. LEONARD
FLORIDA CAPITAL
RESOURCE CENTER
100 N. Biscayne Blvd.,
Suite 3070
Miami, FL 33484
(305) 373-9911

TALBOT "SANDY" D'ALEMBERTE
Counsel of Record
D'ALEMBERTE AND
PALMER, P.L.L.C.
P.O. Box 10029
Tallahassee, FL 32302-2029
(850) 352-6292
palmer@
dalemberteandpalmer.com

Attorneys for Amicus Curiae
Florida Capital Resource Center

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	3
I. The Eleventh Circuit Has Established A Dangerous Precedent With Far-Reaching Implications Incompatible With This Court's Capital Sentencing Jurisprudence	4
II. Florida's Capital Sentencing Scheme Creates A Lower Threshold For Death Sentences And Cannot Constitutionally Sustain the Eleventh Circuit's Rule.	10
CONCLUSION	23

TABLE OF AUTHORITIES

CASES Page

Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007) 9
Apprendi v. New Jersey, 530 U.S. 466 (2000) 11, 21, 22
Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) 11, 18, 19, 22
Caldwell v. Mississippi, 472 U.S. 320 (1985) 21
California v. Brown, 479 U.S. 538 (1987) 14
Eddings v. Oklahoma. 455 U.S. 104 (1982) 9, 10, 16
Espinosa v. State, No. 73,436, 1991 WL 123077 (Fla. July 11, 1991) 8
Estelle v. Gamble, 429 U.S. 97 (1976) 14
Foster v. Commonwealth, 827 S.W.2d 670 (Ky. 1992) 7
Furman v. Georgia, 408 U.S. 238 (1972) 8
Graham v. Florida, 130 S.Ct. 2011 (2010) 14
Gregg v. Georgia, 428 U.S. 153 (1976) 8, 22
Hildwin v. Florida, 490 U.S. 638 (1989) 21
Lockett v. Ohio, 438 U.S. 586 (1978) 8, 9
Penry v. Lynaugh, 492 U.S. 302 (1989) 16, 19
Puiatti v. Dugger, 589 So. 2d 231 (Fla. 1991) 8
Puiatti v. McNeil, 626 F.3d 1283 (11th Cir. 2010) 4, 5, 8, 17
Ring v. Arizona, 536 U.S. 584 (2002) ..... *passim*
Spaziano v. Florida, 468 U.S. 447 (1984) 18
State v. Steele, 921 So.2d 538 (2005) 13
Tedder v. State, 322 So.2d 908 (Fla. 1975) 18
United States v. Bernard, 299 F.3d 467 (5th Cir. 2002) 7

TABLE OF AUTHORITIES—Continued

Page

United States v. Tipton, 90 F.3d 861 (4th Cir. 1996) 7
Walton v. Arizona, 497 U.S. 639 (1990) 11
Woodson v. North Carolina, 428 U.S. 280 (1976) 9

CONSTITUTION

U. S. Const. amend. VI 11
U. S. Const. amend. VIII 2, 3, 10
U. S. Const. amend. XIV 3, 10

STATUTES

Ala. Code §13A-5-46 13
Ala. Code § 13A-5-46(f) 14
Fla. Stat. §921.141 ..... 12, 14, 22
Fla. Stat. §921.141(2) 20
Fla. Stat. §921.141(3) 17, 20
Ga. Code Ann. § 17-8-4(a) 8
Mo. Rev. Stat. § 545.880 8
Ohio Rev. Code Ann. § 2945.20 8

OTHER AUTHORITIES

American Bar Association, *Florida Death Penalty Assessment Report*, Executive Summary of the Florida Death Penalty Report (September 2006) 18
Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ212351, State Court Organization (2004), *available at* http: //bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1204 14

TABLE OF AUTHORITIES—Continued

Page

Death Penalty Information Center, Facts About the Death Penalty, http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last visited May 22, 2011) 5, 13

Death Penalty Information Center, State by State Database, http://www.deathpenal tyinfo.org/state_by_state (last visited May 22, 2011) 12-13

Edward J. Bronson, *Severance of Co-Defendants in Capital Cases: Some Empirical Evidence*, CAL. ST. U., Chico Discussion Paper Series No. 94-1 (1994) 4, 13, 16

Florida Department of Corrections, Death Row Roster, http://www.dc.state.fl.us/activeinmates/deathrowroster.asp (last visited May 22, 2011) 12

Kevin McNally, Declaration of Kevin McNally Regarding Joint and Separate Trials and Outcomes In Multiple Capital Defendant Federal Death Penalty Trials, Doc. 1050-1 (filed 7/24/2009) 17

Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, MICH. ST. L. REV. (forthcoming 2011) 17-18

William J. Bowers *et al.*, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931 (2006) .....*passim*

INTEREST OF *AMICUS CURIAE* [1]

Florida Capital Resource Center ("FCRC") is a nonprofit organization whose mission is to protect the constitutional rights of capital defendants in the State of Florida and ensure they receive the best possible legal representation by providing extensive legal resources to capital defenders and mitigation specialists who find themselves unduly limited by fiscal and systemic constraints rampant in Florida's capital regime.

To that end, FCRC provides free consultation, research, advocacy, and other necessary resources to capital defenders statewide. Additionally, FCRC plays a major role in addressing the greater problems within Florida's capital justice system by researching trends and identifying disparities and injustices therein. FCRC has a loud voice in Florida's Capitol and advocates for legislative change in the capital justice system consistent with defendants' rights.

Founded in 2009, FCRC now has representatives in all 20 of Florida's judicial circuits, including academics, public defenders, private attorneys, mitigation specialists, a former U.S. Attorney, and President Emeritus of the American Bar Association. FCRC

---

[1] Pursuant to Supreme Court Rule 37.2(a), both Petitioner and Respondent have received timely notice of FCRC's intent to file this *amicus* brief. Petitioner Carl Pulatti has consented to the filing of this brief and has lodged a letter of consent with the Clerk of this Court. Respondent Edwin G. Buss, Secretary, Florida Department of Corrections, has withheld consent. Pursuant to rule 37.6, *amicus curiae* affirm that no counsel for any party in this case authored this brief in whole or in part. No person or entity, outside of *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

has partnered with several Florida law schools to establish death penalty clinics, and staffs a number of resource attorneys currently involved in several active capital cases.

Florida Capital Resource Center has a direct interest in the questions presented in this case. Although the specific issues presented in the petition address whether the circumstances of Petitioner's sentencing violated his constitutional rights, the substantive questions ultimately at issue in this case – the disturbingly prejudicial effect the Eleventh Circuit's ruling will have on the more than 389 capital codefendants[2] in Florida currently facing joint capital proceedings and the far reaching implications of that ruling within the context of Florida's already infirm capital sentencing scheme – are a matter of tremendous importance to Florida Capital Resource Center.

We agree with the arguments in Petitioner's brief concerning the existing circuit split on whether joint capital proceedings are in tension with the Eighth Amendment. We submit this brief as *Amicus Curiae* to show why the position the Eleventh Circuit assumed on the issue is incompatible with this Court's capital sentencing jurisprudence and how it creates a dangerous precedent for capital defendants facing a joint sentencing proceeding, particularly those in Florida. *Amicus* also draws the Court's attention to the fact that the Eleventh Circuit's rule becomes even more troublesome when applied in the context of Florida's arguably deficient capital sentencing system.

---

[2] Based on data compiled by Florida's Office of the State Courts Administrator. This number includes capital codefendants facing trial in 59 of Florida's 67 counties.

There are currently 126 pending joint capital cases in Florida involving 389 codefendants, all of whom benefit from access to FCRC resources. Having an interest in the fair and constitutional administration of criminal justice, Florida Capital Resource Center files this brief as *Amicus Curiae* on behalf of all of those defendants, who otherwise have no voice in this action, as well as those who come later and find themselves in a joint penalty proceeding facing the ultimate sentence in the State of Florida.

SUMMARY OF THE ARGUMENT

This case represents a grave miscarriage of justice in that the petitioner's Eighth and Fourteenth Amendment rights to an individualized determination of sentence was severely compromised and resulted in an unconstitutional sentence of death. Further, *Amicus* recognizes that if this ruling is permitted to stand, a rule of law will have been established that erodes the higher standard of protections necessarily afforded those facing the ultimate sentence, applicable whenever two or more capital defendants proceed together through a joint penalty phase.

Endorsing the Eleventh Circuit's refusal to consider even the possibility that a joint penalty proceeding may have constitutional implications distinct and apart from those in the guilt phase puts a constitutional stamp of approval on a dangerous and deadly rule that far from merits one. Such a rule places these codefendants at a manifest and unfair disadvantage in which, *inter alia*, they are significantly

more likely to receive a sentence of death than those tried in cases in which the penalty phase is severed.[3]

Amicus finds this rule especially offensive as applied in Florida, where the capital justice scheme has already lowered the threshold for receiving a death sentence below that of most other jurisdictions in the United States by permitting a recommendation of death by just seven jurors, a troubling scheme further exacerbated by the ability of the trial judge to override a jury recommendation for a life sentence.

Unless this Court grants review, Petitioner may be executed on the basis of a joint death sentence rendered by a jury that was unable and uninstructed to give meaningful consideration to his individual mitigation case.

I. The Eleventh Circuit Has Established A Dangerous Precedent With Far-Reaching Implications Incompatible With This Court's Capital Sentencing Jurisprudence.

On November 29, 2010, the Eleventh Circuit Court of Appeals considerably curbed defendants' rights when they rendered a decision asserting that Petitioner's severance denial did not violate any constitutional right. *Puiatti v. McNeil*, 626 F.3d 1283, 1318 (11th Cir. 2010). The rule, announced by the Eleventh Circuit in its reliance on the lack of Supreme Court precedent specifically addressing joinder in sentencing determinations, creates an irrebuttable presumption that severance in a penalty phase is

---

[3] Edward J. Bronson, *Severance of Co-Defendants in Capital Cases: Some Empirical Evidence*, CAL. ST. U., Chico Discussion Paper Series No. 94-1 (1994).

"improper for codefendants who were properly joined in the guilt phase." *Id.* at 1315.

Though the Eleventh Circuit was accurate in its finding that there is no U.S. Supreme Court precedent on this precise issue, to virtually say that no level of prejudice exists that would require severance, or at a minimum, specific curative instructions to the jury, is inconsistent with interpretations from other circuit courts and is entirely incompatible with this Court's capital sentencing jurisprudence. Significantly, this troubling Eleventh Circuit rule is binding precedent not only in Florida, but also in Alabama and Georgia.[4]

1. As the Eleventh Circuit ruling stands now, not even jury instructions are required to cure any level of prejudice that may occur in a joint capital sentencing proceeding. *See generally Puiatti*, 626 F.3d 1283. According to Judge Hull who delivered the opinion of the court, nothing in a joint penalty proceeding implicates the constitution, distinct and apart from those concerns relevant to severance in joint guilt phase proceedings. *Id.* at 1315. Such a rule is dangerous not only because it fails to acknowledge any constitutional implications whatsoever and neglects to require that curative jury instructions be given in similar circumstances, but also because the implications of the rule are far-reaching and frightening.

Significantly, this decision alerts no prosecutor to the undue prejudice she injects into a joint sentencing proceeding when she groups the defendants

---

[4] Florida, Alabama and Georgia together house 22 % of the nation's death row population. Death Penalty Information Center, Facts About the Death Penalty, http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last visited May 22, 2011).

together in her closing remarks. To understand *Amicus'* apprehension in this regard, one need only envisage what linguistic liberties prosecutors will take throughout the unfettered joint sentencing proceeding the Eleventh Circuit rule contemplates. To be sure, without any explicit direction to the contrary and notwithstanding this Court's unequivocal call for individualized consideration during sentencing, the prosecutor in this case felt uninhibited to repeatedly refer to Petitioner and his codefendant as "two peas in a pod." Pet. Brief at 6.

This ruling identifies no safeguards that can be triggered to combat the confusion that necessarily results when two defendants present their contrariant mitigation cases in a disjointed order within a unified proceeding. Potential confusion of the jury is not so easy to disregard if one imagines a joint sentencing proceeding where not two, but three or four capital codefendants present similar mitigation theories each based upon a characteristic of a codefendant, in a disjointed order. It would be impossible in such a case, as it was for the jury here, to render a decision based upon thoughtful and meaningful consideration to each individual defendant's mitigation theory without admonitory instructions alerting the jurors to guard against their natural inclination to group the codefendants together and render identical sentences for all. Indeed, the Court need only refer to the record in this case, which memorialized the confusion, not only of the jury who recommended death for both defendants by identical 11-1 votes for each, but also of the judge, who himself "could not distinguish the defendants" and "repeatedly confused

one defendant's mitigating evidence for the other."[5] Pet. Brief at 30.

2. As Petitioner notes, other circuits have advanced interpretations of capital sentencing jurisprudence inconsistent with that of the Eleventh Circuit. Those circuits have acknowledged "the inherent tension between joinder and each defendant's constitutional entitlement to an individualized capital sentencing decision." *United States v. Bernard*, 299 F.3d 467, 475 (5th Cir. 2002); and *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996). Though holding against severance, both circuits based their decision, to a great extent, on the trial judge's administration of frequent and curative jury instructions "which sufficed to reduce the risk [of unfairness and prejudice] to acceptable levels." *Tipton*, 90 F.3d at 892; *Bernard*, 299 F.3d at 476.

Tellingly, some state supreme courts have spoken on this issue, including Kentucky, who, while affirming joinder of two capital codefendants in the guilt phase, mandated severance in the sentencing phase. *Foster v. Commonwealth*, 827 S.W.2d 670 (Ky. 1992) (holding that the respective mitigation evidence offered by the codefendants was antagonistic to each other and that the joint penalty phase was "unfairly tainted by the appearance of [the codefendant's] counsel acting as a second prosecutor" to the appellant). Even Florida Supreme Court Justice Rosemary Barkett recognized capital defendants' entitlement

---

[5] In this case, both judge and jury were confused, *inter alia* because of the similarity between codefendants' mitigation theories. *See* Pet. Brief at 28 ("But it is their very similarity that made the two theories mutually exclusive. Each blamed the other as the instigator of the crime and each claimed he would not have done it but for the other.").

to individualized sentencing under the Constitution. *Puiatti v. Dugger*, 589 So. 2d 231 (Fla. 1991); and *Espinosa v. State*, No. 73,436, slip op. at 17-18, 1991 WL 123077 (Fla. July 11, 1991) (Barkett, J., dissenting) (asserting that where defendants present antagonistic defenses, severance should always be the rule in the penalty phase of a capital case).

Others states, have codified a high standard for upholding defendants' constitutional rights by removing severance decisions in capital cases entirely from the discretion of the trial judge. *See* GA. CODE ANN. § 17-8-4(a) (granting severance as of right to any capital defendant so electing); MO. REV. STAT. § 545.880 (2010) (granting automatic severance upon motion of a capital defendant *inter alia* where only one codefendant has a criminal history); and OHIO REV. CODE ANN. § 2945.20 (2011) (making severance mandatory for capital defendants jointly indicted and allowing joinder only upon good cause shown).

3. Additionally, this Court, without speaking directly on the issue, has articulated significant legal analyses under which the Eleventh Circuit ruling cannot endure. While, as the Eleventh Circuit acknowledges, this Court has never held that the special concerns in capital cases require severance in sentencing determinations, *Puiatti*, 626 F.3d at 1315, it has consistently recognized the constitutional "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual." *Lockett v. Ohio*, 438 U.S. 586, 602 (1978).

The principal of individualized consideration in capital sentencing is the cornerstone of this Court's death penalty jurisprudence. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (Stewart, J.) (attesting mandate of *Furman v. Georgia*, 408 U.S. 238 (1972), that

"where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited . . ."). As articulated by Justice Stewart in *Woodson v. North Carolina*, U.S. 280, 304 (1976), we require a heightened degree of reliability "that death is the appropriate punishment," because death is unique in its finality. 428. In *Lockett*, this Court extended the constitutional imperative of directed discretion in capital sentencing to require not only that a capital defendant have an opportunity to present any mitigating evidence that could increase the chance, however slight, of a sentence less than death, but also that a sentencer be unrestricted in the ability to receive and meaningfully consider such evidence. 438 U.S. at 604.

In *Lockett*, according meaningful consideration and effect to the individual during sentencing meant striking down an Ohio statute that did not allow for a sentencing judge to consider mitigating evidence not specifically delineated in the statute. *Id.* In *Eddings v. Oklahoma*, 455 U.S. 104 (1982) it meant prohibiting Oklahoma courts from refusing to consider mitigating evidence as a matter of law. In *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007) it meant requiring an instruction be given a Texas jury that allowed it to consider mitigating evidence beyond the scope of statutory special questions that mandated death when answers to both questions were in the affirmative. Here, in Petitioner's case, at the apex of defendants' constitutional rights it means granting severance of the codefendants at the penalty phase, but at a minimum, it means directing the jury through curative instructions to consider the aggravating and mitigating factors presented by each

defendant only with respect to that individual defendant's sentence.

Today, this Court has an opportunity to carry on "the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings* at 874. The jarringly discordant rule descanted by the Eleventh Circuit must be released and recued in tune with the chorus of constitutional justice. Indeed, only this Court has the power to do so, through the grant of writ of certiorari.

II. Florida's Capital Sentencing Scheme Creates A Lower Threshold For Death Sentences And Cannot Constitutionally Sustain the Eleventh Circuit's Rule.

As stated above, the Eleventh Circuit's holding creates a dangerous precedent. While this Court should grant certiorari to synchronize application of the Eighth and Fourteenth Amendments to capital sentencing proceedings amongst the federal circuits and to prevent this prejudice-compounding rule from spreading to other circuits, it is important this Court appreciate the impact this rule will have on codefendants in the context of Florida's capital justice scheme.[6] Denial of certiorari in this case would leave

---

[6] In discussing Florida, it is worth noting at the outset that the constitutionality of Florida's capital justice scheme has been seriously called into question after this Court's ruling in *Ring v. Arizona*, 536 U.S. 584 (2002). In *Ring*, this Court took issue with Arizona's capital sentencing scheme because it required "a sentencing judge, sitting without a jury, to find [the presence or absence of] an aggravating circumstance necessary for imposition of the death penalty." 536 U.S. at 609. This Court held that "[i]f a State makes an increase in a defendant's authorized

punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt," 536 U.S. at 602 (quoting *Apprendi v. New Jersey*, 530 U.S. 466 (2000)), effectively extending *Apprendi* to both noncapital *and* capital cases. Speaking for the majority, Justice Ginsberg reasoned "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." *Id.* at 609.

The majority opinion declined to comment on the effect its ruling would have on Florida's capital justice scheme, but as then Florida Supreme Court Chief Justice Anstead pointed out in his concurring opinion in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002) (per curiam), it cannot be overlooked that this Court had already observed that Florida's scheme contained the same infirmity that would make it Arizona's "functional equivalent:"

> The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Walton v. Arizona, 497 U.S. 639, 648 (1990). Indeed, the fact-finding role of Florida's judge in capital sentencing was not lost on Justice O'Connor. *See Ring*, 536 U.S. at 621 (O'Connor, J., dissenting) (expressing concern that the fact-finding role of Florida's judges in capital sentencing is now subject to challenge under *Ring*) After reviewing Florida's capital sentencing scheme in light of these rulings, *Amicus* cannot help but conclude that it is constitutionally deficient. And while the Florida Supreme Court has declined to strike down the statute until this Court speaks directly to Florida, at the time *Ring* was decided, a majority of the justices seemingly agreed. *See Bottoson*, 833 So.2d 693 (2002) (per curiam), (Anstead, C.J., concurring) (relying heavily on Justice Scalia's interpretation of the Sixth

open the iron gates of due process that safeguard capital codefendants' right to individualized sentencing, allowing prejudice to penetrate joint-penalty proceedings with little judicial restraint.

Several aspects of Florida's statutory capital sentencing scheme act to lower the threshold for receiving a death sentence below that of perhaps any other jurisdiction, making Florida a uniquely dangerous place for capital defendants to stand trial. Installation of the Eleventh Circuit's rule from Petitioner's case as a permanent fixture will only serve to exacerbate these conditions at great cost to codefendants' rights.

First, unlike any other state, Florida requires only a *bare majority* of the jury to recommend a death sentence. See Fla. Stat. §921.141 (2010). Second, Florida's scheme includes a "jury override" provision that permits judges to impose a sentence that is contrary to any jury recommendation. *See id.* Finally, any sentence arrived at by the jury is only "advisory," instead relying on the judge to enforce the jury's decision. *See id.*

Aside from the constitutional implications of each individual component of Florida's capital sentencing scheme, the lower threshold for death sentences they collectively create has contributed to Florida housing the second-highest death row population in the country.[7] As shown below, empirical evidence suggests

---

Amendment as written in his concurring opinion in *Ring*), (Shaw, Pariente, & Lewis, J.J., concurring).

[7] Florida currently has 397 people on death row. *See* Florida Department of Corrections, Death Row Roster, http://www.dc.state.fl.us/activeinmates/deathrowroster.asp (last visited May 22, 2011). At 704, California has the most. *See* Death Penalty

that this scheme has a detrimental effect on the reliability of Florida jurors, further compromising a defendant's right to an individualized sentencing determination. *See* William J. Bowers *et al.*, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931 (2006). Because research demonstrates that juries are significantly more prone to recommend death in joint penalty proceedings,[8] *Amicus* submits that the Eleventh Circuit's rule is simply too much for Florida's codefendants to bear.

As a preliminary matter, Amicus acknowledges that the constitutionality of Florida's overall capital sentencing scheme is not an issue before this Court. However, *Amicus* raises constitutional concerns regarding specific aspects of that system to help this Court recognize that when the Eleventh Circuit's rule is applied in Florida, the scales of justice are tipped intolerably away from defendant rights and toward prejudicial and unconstitutional prosecution.

1. First, Florida is the only jurisdiction in the United States in which just seven jurors can recommend the ultimate sentence. *State v. Steele*, 921 So.2d 538, 550 (2005). In fact, of the 34 states that still retain the death penalty,[9] Florida and Alabama are the only two jurisdictions remaining in which the

---

Information Center, State by State Database, http://www.deathpenaltyinfo.org/state_by_state (last visited May 22, 2011). Alabama comes in third with 204 death row inmates. *See id.* Like Florida, juries in Alabama also provide advisory sentences. *See* Ala. Code §13A-5-46 (2010).

[8] *See* Bronson, *supra*, note 3.

[9] *See* Facts About the Death Penalty, *supra*, note 4.

jury's recommendation can be anything less than unanimous,[10] though even Alabama refuses to allow a death recommendation by less than ten jurors. *See* Ala. Code § 13A-5-46(f). Whether this indicates Florida and Alabama are unconstitutionally resistant to a "national consensus" reflecting the "evolving standards of decency that mark the progress of a maturing society" is not before the Court. *Graham v. Florida*, 130 S.Ct. 2011, 2021 (2010) (citing *Estelle v. Gamble*, 429 U.S. 97 (1976)). What is of concern, however, is that allowing for such a small number of jurors to impose such a large sentence has serious implications on a defendant's rights.

An advisory sentence of death should be a reflection of a jury's reasoned, moral response to the defendant's background, character and crime. *California v. Brown*, 479 U.S. 538, 545 (1987). One might expect such a powerful determination to only result from meaningful, time-consuming deliberation. However, empirical evidence shows that Florida jurors are making this determination faster than anywhere else, and for a simple reason: the deliberations end with just seven votes. *See* Fla. Stat. § 921.141 (2010).

In Bowers, *supra*, researchers from the Capital Jury Project used data collected from actual capital jurors across fourteen states to compare the reliability of jurors in "binding" states (those where the jury's determination of sentence is binding on the judge) with those in "hybrid" states (those where jurors recommend an advisory sentence but the judge makes the final sentencing determination). Bowers,

---

[10] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ212351, STATE COURT ORGANIZATION, 251-53 (2004), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1204.

supra, at 950-52.[11] When researchers examined the differences in time spent deliberating between these two types of jurors, they discovered that jurors in hybrid states like Florida "decided on punishment much more quickly" than those in binding states, reporting that hybrid jurors are "more likely to decide [whether to render a death sentence] *in an hour or less* and less likely to take three or more hours to decide." *Id.* at 974-75 (emphasis added). The report further found that the number of jurors "required for reaching a death verdict seems to be what accounts for the sizable hybrid-binding difference in deliberations lasting longer than three hours;" jurors from Alabama and Florida, the only two states that do not require a unanimous jury, reported far lower deliberation times than all other "unanimous states." *Id.* Significantly, however, between those two states, even Alabama jurors reported deliberating for three or more hours twice as often as Florida jurors, demonstrating just how detrimental an effect Florida's majority rule has on jury deliberations. *Id.*

This shorter deliberation period has obvious implications on a defendant's right to a meaningful, individualized sentencing determination; if Florida jurors are deliberating for such short amounts of time, it follows that they are very likely giving a defendant's individual circumstances much less consideration.

---

[11] The Capital Jury Project is a national program of research on the decision-making of capital jurors conducted by a consortium of university-based researchers with the support of the National Science Foundation." Bowers, *supra*, at 950. States in which jurors were interviewed for this study included Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia. *Id.*

See Penry v. Lynaugh, 492 U.S. 302, 319 (1989) ("*Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence."). Indeed, Bowers reports that Florida jurors asked to review testimony or transcripts during deliberations much less frequently than any other state surveyed.[12] Bowers, *supra*, at 976-77. Finally, after suggesting that the "number of votes the jury takes to reach its punishment may reflect the degree to which jurors challenge and contest the views of their peers," or perhaps "the kind of healthy disagreement that forces jurors to soberly review and rethink their assumptions and conclusions," Bowers notes that Florida jurors decided their sentence after just one vote far more often than those of any other state. *Id.* at 975-76.

Thus, Florida's majority rule stifles meaningful deliberation for the simple reason that finding agreement between seven people is faster and easier than finding it amongst twelve. There is no reason to expect these findings would be any different if the case involved codefendants. In fact, the tendency of Florida's jurors to rush through deliberations without adequately considering the evidence before them might lead to the "lumping" effect noted in Bronson, *supra*, at 4-5, in which jurors "lump" codefendants

---

[12] Bowers further reports that the narrative "accounts of many jurors in hybrid states indicate that they did not devote much time, energy, or emotional commitment to the punishment decision," citing one Florida juror who remarked "I firmly believe that within 2 minutes of walking into the jury room everybody there knew exactly the way he was going to vote." Bowers, *supra*, at 979.

together based on faulty assumptions about common attributes.[13] Indeed, both defendants in Petitioner's case were sentenced to death by the same majority (11-1) of a jury that delivered their advisory sentence in "about an hour."[14] *Puiatti v. McNeil*, 626 F.3d at 1300. While *Amicus* cannot speak to what occurred in the jury room during the deliberations in Petitioner's case, *Amicus* does submit that given the prejudicial nature of his penalty phase and the empirical evidence discussed above, judges conducting Florida's capital sentencing proceedings must be all the more admonitory in jury instructions. It follows that providing *no instructions* to the jury (as in Petitioner's case), particularly in a joint-penalty proceeding, most often will pose significant risks of contravening defendant's right to an individualized sentencing determination.

2. Second, Florida's statute allows judges to override an advisory jury sentence. *See* Fla. Stat. §921.141(3) ("Notwithstanding the recommendation of a majority of the jury, the court . . . shall enter a sentence of life imprisonment or death . . . ."). In fact, "[b]etween 1972 and early 2011, a total of 166 death sentences were imposed in Florida following a jury

---

[13] While no research on the lumping effect within Florida's capital justice system currently exists, there is evidence supporting this proposition in the Federal system. *See* KEVIN MCNALLY, DECLARATION OF KEVIN MCNALLY REGARDING JOINT AND SEPARATE TRIALS AND OUTCOMES IN MULTIPLE CAPITAL DEFENDANT FEDERAL DEATH PENALTY TRIALS, Doc. 1050-1 (filed 7/24/2009) (reporting that while "district courts have granted separate trials or separate penalty hearings in a clear majority of cases," "in those trials involving more than one capital defendants, juries have reached the same verdict on punishment – either life or death – for all defendants in nearly every case.").

[14] Deliberation time confirmed by Petitioner's trial counsel, Howardene G. Garrett, in phone call on May 25, 2011.

recommendation of life imprisonment." Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, MICH. ST. L. REV. (forthcoming 2011). Despite the limitations placed on use of the jury override to impose a death sentence following an advisory life sentence in *Tedder v. State*, 322 So.2d 908 (Fla. 1975) (holding "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."), 35 of such overrides have been upheld on direct appeal since the *Tedder* Standard was first handed down. *See* Radelet, *supra*.

The constitutionality of such a statutory mechanism is certainly questionable,[15] especially since this Court's ruling in *Ring v. Arizona*. 536 U.S. 584. As Justice Lewis of the Florida Supreme Court noted in *Bottoson*, the decision in *Spaziano v. Florida*, 468 U.S. 447 (1984) (holding Florida's judicial override provision constitutional), "was premised upon an unstated presumption that jury involvement is not required in the sentencing proceedings of capital cases." 833 So.2d at 727 (Lewis, J., concurring). Addressing the conflict created by *Ring*, he concluded that if "*Apprendi* and *Ring* support the proposition that it is unconstitutional for a trial judge to independently find fact with regard to aggravators and impose a sentence of death without jury involvement,

---

[15] American Bar Association, *Florida Death Penalty Assessment Report*, Executive Summary of the Florida Death Penalty Report at vii, x (Sept 2006) (questioning whether the judicial override survives this Court's ruling in *Ring v. Arizona* and recommending Florida eliminate the practice and "give the jury final decision-making authority in capital sentencing proceedings").

surely the Supreme Court's *Spaziano* decision . . . cannot now stand." *Id.*

Constitutionality aside, the jury override provision is still Florida law, and though it explicitly provides a "backdoor" through which judges can impose death sentences, its very existence further lowers the threshold of receiving one because of its collateral effects on Florida jurors. In Bowers, *supra*, at 948, researchers examined the effect the judicial override has on jurors' perceptions with respect to their responsibility as sentencers. Bowers found that "jurors in hybrid states were especially unlikely to see themselves as responsible for the defendant's punishment, [as nearly] all jurors in the three hybrid states understood that the judge did not have to accept their punishment decision." *Id.* at 954. Further, mere knowledge of the override causes jurors to feel less vested in their decision. *Id.* at 963. Consequently, these jurors "are more likely to deny responsibility, invest less energy in understanding instructions, and more often rush to judgment," three ingredients when mixed with Florida's majority verdict rule produce faster, less meaningful deliberation. *Id.* at 975; *see Penry*, 492 U.S. at 319.

Finally, Bowers' research also suggests that the jury override may produce uninformed jurors because while those in hybrid states like Florida often had trouble identifying whether they were limited to consideration of statutory mitigating and aggravating factors, nearly all understood that the judge could override their advisory sentence, indicating that jurors fixate on that portion of the jury instructions. Bowers, *supra*, at 966-69. Thus, the jury override rule poses a significant threat to individualized sentencing determinations as it produces disinterested

and uninformed juries charged with rendering advisory sentences of life or death. It would seem, then, reminding juries of their duty to provide individualized sentencing determinations when faced with co-defendants should be standard practice; yet in Petitioners case, the Eleventh Circuit held such instructions were not even necessary when the proceedings were wrought with prejudice, an unnecessarily harsh rule, especially in the context of Florida's capital sentencing scheme.

3. Finally, the advisory role of Florida's capital juries has a prejudicial effect on defendants rights stemming from the reallocation of fact-finding that resonates throughout the entire capital system. It is perhaps here where the constitutional implications of *Ring* are heard loudest:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

Ring, 536 U.S. 584 (Scalia, J., concurring). Despite that edict, pursuant to Florida's capital sentencing statute, the "aggravating circumstances" required to impose a death sentence are only *found* by the trial judge: "If the court imposes a sentence of death, it shall set forth in writing *its findings* upon which the sentence of death is based as to the *facts* (a) *that sufficient aggravating circumstances exist* . . . ." Fla. Stat. § 921.141(3). Further, while the jury renders an advisory sentence as to their existence, those "advisory findings" are never specified to the court. *See* Fla. Stat. §921.141(2). Thus, even if the jury

"advises" their existence, any aggravating circumstances found by the judge will not necessarily be the same as those "advised" by the jury. Though held constitutional in *Hildwin v. Florida*, 490 U.S. 638 (1989), this scheme is now suspect at best under *Ring*, which would likely consider Florida's aggravating circumstances to be the functional equivalent of elements of a crime. *See Apprendi*, 530 U.S. 466.

Notwithstanding its questionable constitutionality, that is the law followed in Florida, and it presents three prejudicial problems for capital defendants: (1) The judge has usurped the fact-finding duty of the jury, effectively eliminating the benefit of discourse amongst deliberating jurors; (2) the jurors are aware that the judge makes the final determination, causing them to deliberate less in rendering their advisory opinion; and (3) the advisory sentence cripples any chance at meaningful review because the jury's "findings" are neither written nor orally specified for the record.

In *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), this Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Despite *Caldwell's* edict, Bowers found that "hybrid statutes undermine jurors' sense of the jury's responsibility." Bowers, *supra*, at 959. This reduced sense of responsibility "carries the further ominous implication that jurors under hybrid statutes are apt to be less conscientious in making the awesome moral judgment at the heart of capital sentencing." *Id.* at 960. Perhaps this is to be expected when the finders of fact are no longer charged with *finding* facts.

In *Bottoson*, Chief Justice Anstead makes particular note of the potential problems associated with judicial fact-finding. 833 So.2d at 706-08 (concurring). Because the advisory jury makes no findings of fact, the facts contained in the record are facts that were found – and written – by the trial judge. *See* Fla. Stat. §921.141 (2010). It is these same facts on which the judge imposes his sentence, and it is these same facts that are mandatorily reviewed by the Florida Supreme Court. *Id.* On appeal, the record will only contain those same, judicially found facts. Thus, pursuant to Florida statute, not only does the trial judge usurp the fact-finding duty from the jury in a capital penalty phase, but it is the judge's facts on which a capital defendant is forced to base his appeal. *Bottoson*, 833 So.2d at 706-08.

Such a penalty scheme clearly demonstrates the importance of this Court's decision in *Ring*, 536 U.S. 584: "Entrusting to a judge the finding of facts necessary to support a death sentence might be 'an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State,'" but neither *Amicus* nor Petitioner are prepared to live in such a society. *Ring*, 536 U.S. at 607 (citing *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring). Petitioner was subjected to an unfairly prejudicial joint-penalty proceeding that infringed upon his right to individualized consideration, and the Eleventh Circuit determined that such a proceeding does not even warrant a jury instruction. Such a rule imposes too high a risk upon the rights of codefendants facing "the most irrevocable of sanctions," especially here in Florida. *Gregg*, 428 U.S. at 182.

CONCLUSION

Amicus has shown the far-reaching and dangerously prejudicial implications of the Eleventh Circuit's holding, particularly as contextualized within the State of Florida. Accordingly, *Amicus* respectfully requests this Court grant a writ of certiorari to the Eleventh Circuit.

Respectfully submitted,

JENNIFER L. GREENBERG
TERENCE M. LENAMON
STUART L. HARTSTONE
ALLISON J. LEONARD
FLORIDA CAPITAL
RESOURCE CENTER
100 N. Biscayne Blvd.,
Suite 3070
Miami, FL 33484
(305) 373-9911

TALBOT "SANDY" D'ALEMBERTE
Counsel of Record
D'ALEMBERTE AND
PALMER, P.L.L.C.
P.O. Box 10029
Tallahassee, FL 32302-2029
(850) 352-6292
palmer@
dalemberteandpalmer.com

Attorneys for Amicus Curiae
Florida Capital Resource Center

May 25, 2011